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Honorable Edward J. Lodge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ST. ISIDORE FARM, LLC, an Idaho limited liability company; and GOBERS, LLC, a Washington limited liability company,

Plaintiffs,

vs.

COEUR D'ALENE TRIBE OF INDIANS, a federally-recognized Indian tribe, JOHN DOES 1-10, each of which are Members of the Coeur d'Alene Tribe of Indians,

Defendants.

No. CV-13-00274-EJL

TRIBAL REPLY RE: MOTION TO DISMISS

COMES NOW the Coeur d'Alene Tribe, by and through its attorneys, and submits the following reply in respect to Plaintiffs' response to the Tribe's Motion to Dismiss.

ISSUE TO BE DECIDED

The issue presented to the Court is whether or not the Federal District Court should stay its hand by dismissing or staying the present action to allow the Coeur d'Alene Tribal Court to decide the jurisdictional challenges raised by Plaintiffs. For the reasons stated below, the Coeur d'Alene Tribe submits that exhaustion in Tribal Court is required.

JURISDICTION AND EXHAUSTION

The Tribe has moved for dismissal of the Plaintiffs' action based upon a lack of exhaustion of Plaintiffs' remedies in Tribal Court. The Court's July 16, 2013, order clearly identified the interrelationship of whether or not Federal Court has jurisdiction at this point in time or whether Plaintiffs are required to exhaust jurisdictional challenges in Tribal Court.

Jurisdiction

The Tribe has alleged it has regulatory and adjudicatory jurisdiction over the Plaintiffs' conduct of dumping, spreading or injecting human waste on non-Indian fee land within the exterior boundaries of the Coeur d'Alene Tribe's Reservation. The Tribe has consistently asserted that Tribal Court has jurisdiction based upon ***Montana v. United States***, 450 U.S. 544 (1981) and ***Plains Commerce Bank v. Long Family Land and Cattle Co.***, 554 U.S. 316 (2008). Specifically, the Tribe has alleged the second exception to ***Montana v.***

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U.S., *supra*, hereinafter referred to as the "threat exception" is a jurisdictional basis for the Tribe to assert regulatory and adjudicatory jurisdiction.

Justice Roberts writing for the majority in ***Plains Commerce*** analyzed the threat exception established in ***Montana v. United States***, "As our cases bear out, (citations omitted) the Tribe may quite legitimately seek to protect its members from **noxious** uses that threaten Tribal welfare, security, or from non Member conduct on the land that does the same." (emphasis added) ***Plains Commerce*** at 336. It was Justice Roberts' language to use the word "noxious" and there are few substances more noxious than human waste.

Justice Roberts went further analyzing the threat exception and acknowledged a commentator's thought that there was an elevated threshold or prevention of "catastrophic consequence" requirement in the second exception to ***Montana***. Specifically, the Court indicated: "One commentator has noted that 'the elevated threshold' for application of the second ***Montana*** exception suggests that Tribal power must be necessary to avert catastrophic consequences." ***Plains Commerce*** at 341.

If the Supreme Court has changed the threat exception under ***Montana*** to a "catastrophic consequences" outcome, the Tribe still has jurisdiction for the protection of the Tribal community and its members. Under a threat analysis or "catastrophic consequences" analysis, the critical point is how the Tribe, as a

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sovereign entity, perceives a threat or potential "catastrophic consequence." Historically Tribes have grievously suffered health and disease consequences, such as cholera epidemics and smallpox epidemics. The Tribe is best suited to evaluate the danger, risk, threat, menace or even prevent catastrophic consequences to the Tribal community based upon the Tribal community's environment that does involve subsistence hunting and hunting for cultural purposes. Further, it is doubtful Plaintiffs would suggest that commercial disposal of human waste is not a safety risk. The United States Department of Environmental Quality and the Idaho Department of Environmental Quality recognize human waste disposal as a threat to human health.

Governmental entities, such as the Coeur d'Alene Tribe, the United States, and the State of Idaho legitimately seek to prevent calamitous health hazards to the constituent population. "Catastrophic consequences," although not defined, can be either human caused or natural occurrences. In both situations prevention and protection is a recognized governmental function. Health hazards from human caused means have been prevented by cleaning up the water supply. Governmental inspection of food processors is clearly a governmental function. Disease prevention and control is a governmental function through prevention, education, inoculation and treatment. All of these examples are preventive governmental regulatory functions for the protection of the health and welfare of

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society. The Tribe's effort to regulate Plaintiffs' conduct falls within an appropriate governmental function of the Tribe to protect Tribal members and the Tribal community from recognized health hazards in the context of an Indian tribe's unique living environment and cultural history. There is an old saying that comes to mind - "An ounce of prevention is worth a pound of cure." The Tribe, in seeking to prevent a health hazard to the Tribal community, is far more expeditious than responding to a health outbreak.

The threat analysis to the Tribe should be viewed through the lens of the Tribe in Indian country, not through the lens of the world outside of Indian country. In support of this proposition, the Court's attention is called to ***Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians***, 471 U.S. 845 (1985) wherein the court in discussing the rationale behind the exhaustion requirement held,

> "Exhaustion of Tribal court remedies, moreover, will encourage Tribal courts to explain to the parties the precise basis for accepting jurisdiction **and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.** (Emphasis added)

Nat'l Farmers Union, 471 U.S. at 856-857.

Exhaustion

A jurisdictional challenge in Tribal Court is a prerequisite to challenging jurisdiction in Federal Court. This was recently reiterated as the rule in the Ninth

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Circuit. *See*, ***Grand Canyon Skywalk Development, LLC v. Sa-Nyu Wa, Inc.***, 715 F.3d 1196, 213 W.L. 1777060 (Ninth Circ. 2013). The only exception Plaintiff relies upon is Tribal Court jurisdiction is plainly lacking.

The exceptions to the exhaustion rule are narrow exceptions. "Although the Supreme Court has crafted narrow exceptions to the exhaustion rule, none applies here." ***Atwood v. Fort Peck Tribal Court***, 513 F.3d 943, 948 (2008).

The plainly lacking jurisdictional exception to exhaustion was set forth in ***Strate v. A-1 Contractors***, 520 U.S. 438 (1997) and reiterated in ***Nevada v. Hicks***, 533 U.S. 353 (2001). ***Strate*** involved a motor vehicle accident on a highway running through a tribal reservation. The Supreme Court found that the motor vehicle accident involving a non-Indian driver on the state owned highway and the insurer for the driver did not implicate the threat exception under ***Montana v. U.S. Strate***, 520 U.S., 457. Subsequently the U.S. Supreme Court in ***Nevada v. Hicks***, 533 U.S. 353 (2001), was faced with a jurisdictional challenge to Tribal Court jurisdiction. The Court ruled that state officials challenging Tribal Court jurisdiction were not required to exhaust the Tribal Court jurisdiction when facing claims in Tribal Court over torts and civil rights claims under 42 U.S.C. §1983. The Court focused on whether or not the Tribes had legislative and adjudicative jurisdiction under the inherent sovereignty of a tribe or whether there was a grant of federal authority to regulate state wardens

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executing search warrants. The Court concluded the Tribe's inherent sovereignty did not extend to regulating the game wardens, and secondly Tribal Courts were not courts of general jurisdiction with authority to adjudicate §1983 claims. Stated another way, the United States Congress did not grant authority to tribes to adjudicate federal statutes pertaining to civil rights claims.

The grant of regulatory authority is established by the United States Supreme Court's holding in ***Montana***. The Court in ***Montana***, ***Strate***, ***Nevada v. Hicks***, and ***Plains Commerce Bank*** all confirmed that Tribes have the judicially approved federal authority to regulate and adjudicate conduct on non-Indian fee land when the noxious conduct is a threat to the health, welfare and political integrity and sovereignty of a Tribe. Specifically the **Plains Commerce Bank** court held at 330 as follows:

> "These rules have become known as the *Montana* exceptions, after the case that elaborated them. By their terms, the exceptions concern regulation of 'the *activities* of nonmembers' or 'the conduct of non-Indians on fee land.'"

The Tribe's complaint, as filed in Tribal Court, is before this Court along with declarations establishing the Plaintiffs' conduct is a serious health risk, menace, or a potential calamitous event. The standard established by the Ninth Circuit Court of Appeals in cases involving litigants seeking to avoid the exhaustion doctrine is whether or not a Tribe has established a colorable or

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plausible jurisdictional basis. "Finally, it is not 'plain' that Tribal Court jurisdiction is lacking. (citations omitted) We have equated that inquiry with whether jurisdiction is 'colorable' or 'plausible'." ***Atwood v. Fort Peck Tribal Court Assiniboine***, 513 F.3d 943, 948 (9th Cir. 2008).

Plaintiffs' responsive argument does not address the Tribe's allegations and declarations regarding the health and welfare threat to Tribal members coming into contact with wild animals and eating the animals. Rather than address the Plaintiffs' shortcomings in spreading sewage, Plaintiffs merely claim the asserted threat and risk is too attenuated or speculative.

Plaintiffs' Operation & Maintenance Manual, prepared by Plaintiffs' retained expert Robert M. Tate, is attached to the Supplemental Declaration of Thomas Briggs. This Operation & Maintenance Manual covers how the Plaintiffs are to conduct their activities. The manual states the land applier of sewage is required pursuant to the operation plan and 40 CFR Part 503, *et seq*.: "The applier must also assure that the landowner follows crop harvesting, animal grazing and site access restrictions." *Operation and Maintenance Plan*, page 7.

Pursuant to Plaintiffs' operation plan and the federal EPA requirements in 40 CFR Part 503, there are both site restrictions and grazing restrictions. Under the grazing restrictions, "Animals shall not be allowed to graze on the land for thirty days after application of domestic sewage." *Operation & Maintenance*

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Plan, page 13; 40 CFR 503.32(b)(5). In addition, there are crop restrictions pursuant to Part 503 of the EPA provisions and also included within the *Operation & Maintenance Plan*. For example, under Crop Restrictions, "Animal feed, fiber, and those food crops that do not touch the soil surface shall not be harvested for thirty days after application of the domestic septage." *Operation & Maintenance Plan*, page 13.

The United States Environmental Protection Agency, the State of Idaho Department of Environmental Quality, and even by admission the Plaintiffs all acknowledge that application of sewage waste needs to be regulated and controlled to the extent that animals are not to be permitted to graze the septage area for thirty days after application. Based upon the Supplemental Declaration of Tom Briggs, the declarations of Alfred Nomee and Vince Peone, the Plaintiffs' conduct permits the wild animals roaming the reservation to graze, pasture, travel through, bed down and wallow in sewage waste areas.

To the extent the Court determines that the second exception under ***Montana*** involves a showing of catastrophic consequences, Justice Roberts' full quote is enlightening. Justice Roberts stated:

> One commentator has noted that 'the elevated threshold for application of the second Montana exception suggests that the tribal power must be necessary to **avert** catastrophic consequences.' ***Plains Commerce Bank***, 554 U.S. 341. (Emphasis added)

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Justice Roberts' quote indicates tribes, such as the Coeur d'Alene Tribe, are permitted to protect Tribal members from "catastrophic consequences." The word "avert" is a synonym for prevention, and the Tribe merely seeks to prevent a health hazard to Tribal members.

Tribal Court jurisdiction exists as more than colorable or plausible. Whether one refers to the second exception in ***Montana*** as the threat exception or prevention of "catastrophic consequences" exception, the United States Supreme Court has repeatedly ruled that Tribes can exercise jurisdiction over conduct on non-Indian fee land to protect the health, welfare, and political integrity of a Tribe when the conduct exposes the Tribal community and its members to noxious activity.

REPLY TO PLAINTIFFS' ARGUMENT

The Tribe is very mindful of what the Supreme Court held in ***Montana*** and ***Plains Commerce*** regarding a tribe's ability to regulate conduct that threatens the health and welfare and political integrity of the Tribe. The Tribe's efforts to regulate the conduct does not mean the Plaintiffs' conduct will be terminated. Rather, the efforts of the Tribe in Tribal Court are to seek regulatory authority and oversight over the conduct that is a threat to the Tribal community.

Federal and State Regulation – Plaintiffs have suggested the Tribe should not be allowed to regulate its disposal of untreated and untested human

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waste because the conduct is regulated by the United States Environmental Protection Agency and the State of Idaho Department of Environmental Quality. Such argument is unpersuasive. First, for close to two hundred years the Supreme Court has recognized Indian Tribes as independent, sovereign political communities which are uniquely qualified to exercise many of the rights of self government. Tribes have the right of self government to protect the Tribal members. See ***Plains Commerce Bank***, 554 U.S. at 327, citing ***Worcester v. Georgia***, 6 Pet. 515 (1832); ***United States v. Wheeler***, 435 U.S. 313, (1978). Secondly, Indian tribes in the United States have had longstanding problems in respect to the United States protecting the interest of Indian tribes. *See*, ***Cobell v. Salazar,*** 679 F.3d 909 (D.C. App. 2012); Cobell Settlement www.IndianTrust.com, wherein the United States Department of Interior mismanaged Indian tribal interests. *See*, ***Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act***, P.L. 103-436 (1994); See ***Nez Perce Tribe v. Salazar,*** United States District Court for District of Columbia Case No. 06cv02239-TFH Document 118. Thirdly, Plaintiffs' operations are not in compliance with the EPA rules under 40 CFR 503 in that the operation openly has animals grazing the property within thirty (30) days of septage application. (See Supplemental Declaration of Tom Briggs, Declaration of Alfred C. Nomee,

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Vince Peone) Lastly, there is no preemption by the United States. Preemption would be an exception to the Exhaustion Rule.

The Coeur d'Alene Tribe of Indians cannot rely upon the United States or the State of Idaho to protect the health and welfare of Tribal members. The Tribe is properly seeking to protect the Tribal community from a real and significant threat with "catastrophic consequences" to the health and welfare of the Tribe.

Exhaustion Threshold – Plaintiffs' response is in essence an effort to pre-try the case. Specifically Plaintiffs have moved to strike declarations, and the Tribe has responded by a separate Memorandum of Law regarding admissibility of the declarations. Nonetheless, it appears that Plaintiffs are misconstruing the line of Tribal Court exhaustion cases. The Tribe has submitted briefing as a part of its Motion to Dismiss discussing the exhaustion issues, which is also contained within this brief. The standard is whether or not Tribal Court jurisdiction is colorable or plausible. ***Atwood v. Fort Peck Tribal Court***, 513 F.3d 948.

The Tribe initially submitted declarations and has since submitted supplemental declarations addressing the threat to the health and welfare of the Tribe. For the most part these declarations address the issue of wild game grazing the site. It is telling that the Plaintiffs suggest the Tribe's experts'

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opinions should be stricken when the opinions address the health and welfare threat to the Tribe, and contemporaneously submit expert declarations indicating there is very little risk of threat. That is, there are battling experts that do not agree, which clearly means jurisdiction in Tribal Court is colorable or plausible.

Plaintiffs' response to not address the threat factor of wild animals grazing the disposal site, except for objections to Cameron Heusser's declaration and the declaration of Scott Fields, is telling. There is probably a good reason Plaintiffs have not addressed the wild animals grazing on the site and that is because wild animals are grazing on the site, and these wild animals are a traditional food source of Tribal members. Honey bucket and septic tank waste is not appropriate feed lot for animals that are consumed by Tribal members.

The EPA provisions under 40 CFR 503, *et seq*., provide that animals will not be grazed or pastured on septage disposal sites for 30 days after application. The Supplemental Declaration of Tom Briggs points this out under the provisions of the EPA as well as the Plaintiffs' Operating & Maintenance Manual. Further, the declarations of Alfred C. Nomee and Vince Peone are being submitted to the Court from the Tribal member perspective as it relates to how Tribal members subsist and provide food for their families as well as senior citizens.

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Threat Versus Direct Effect – Plaintiffs' argument seems to confuse the second exception to ***Montana*** by arguing there is no evidence of direct effect or impact upon the Tribe. The second exception states:

> "Second, a tribe may exercise 'civil authority' over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, economic security or the health or welfare of the tribe." ***Montana,*** 450 U.S. 566.

The Tribe is not required to prove a direct effect; rather the Tribe must only prove a threat. The Tribe has proven a real and significant threat to the health and welfare of the Tribal community.

Exhaustion Cases – Plaintiffs have gone to great length to distinguish the cases cited by the Tribe in respect to the Exhaustion Doctrine. There are not many Ninth Circuit exhaustion cases. What is revealing is that Plaintiffs have not cited one case to the Court where a district court or the court of appeals has found exhaustion to be unnecessary. The cases cited by the Tribe have differing facts, some involving consensual relations and some occur on tribal land, and one involves tribal zoning. Even though the cases cited are not the same set of facts as the present case, the cases all hold that if Tribal Court's jurisdiction is colorable or plausible, exhaustion is required.

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CONCLUSION

Plaintiffs' conduct in spreading human waste is a recognized risk to the health, safety, and welfare of society, including Coeur d'Alene Tribal members. The EPA, the State of Idaho and the Coeur d'Alene Tribe recognize human waste as a risk.

The Tribe has submitted substantial evidence to the Court in support of the septage being a specific threat to the health and welfare of the Tribe. The threat analysis or prevention of "catastrophic consequences" analysis should be viewed from the perspective of the Tribe in that it is the Tribal members' health and welfare that is as risk, and as shown by the declarations, Tribal members are dependent upon the wild game for subsistence. The wild game grazes the sewage site at will without restriction.

The Ninth Circuit has indicated exhaustion is a pre-requisite to challenging Tribal Court jurisdiction in Federal Court, and further held that the jurisdictional analysis for the Court is plausibility or colorable. The risk, threat, and danger to the Tribe has been established

The Tribe requests the Court to either dismiss or stay these proceedings requiring the Plaintiffs to exhaust their remedies in Tribal Court as provided by the United States Supreme Court precedence as well as the Ninth Circuit Court of Appeal's precedence.

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Respectfully submitted this 26th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 2013, I electronically filed the foregoing with the Clerk of the Court using CM/ECF System, which will send notification of such filing to the following:

Ausey H. Robnett, III via ausey.robnett@painehamblen.com
Gregg R. Smith via Gregg.smith@painehamblen.com

I hereby further certify that I have caused to be served a true and correct copy of the foregoing document(s) on the non-CM/ECF participants as indicated:

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/s/ Everett B. Coulter, Jr.

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